No. 78-171

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSE L. FERNANDEZ-GUZMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 4-15) is reported at 577 F. 2d 1093. The court of appeals' memorandum order (Pet. App. 16-27) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1978. A petition for rehearing was denied on June 30, 1978. The petition for a writ of certiorari was filed on July 29, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in ruling on a motion to suppress evidence discovered during a search incident to a warrantless arrest, the court is restricted to considering only evidence recited in the complaints filed after the arrest pursuant to Fed. R. Crim. P. 5(a).

2. Whether petitioner's arrest was supported by probable cause.

RULES INVOLVED

Fed. R. Crim. P. 5(a) provides:

> *In General.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. §3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

Fed. R. Crim. P. 4(a) provides:

> *Issuance.* If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Pet. App. 5). He was sentenced to five years' imprisonment to be followed by a special parole term of three years (Pet. 8). The court of appeals affirmed (Pet. App. 4-27).

Acting on a tip provided by an informant who had previously provided reliable information, federal agents commenced surveillance of petitioner and his co-defendant Jose Rodriguez, who they believed were involved in distributing a large shipment of narcotics. After they had observed a series of activities that appeared to be part of the distribution, the agents arrested petitioner and Rodriguez. At the time of the arrest petitioner was carrying a bag that contained two kilograms of heroin (Pet. App. 22-24).

Since the arrests had been made without a warrant, the arresting officers filed complaints pursuant to Fed. R. Crim. P. 5(a) at petitioner's initial appearance before the federal magistrate.[1] Prior to trial petitioner moved to

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[1]Two complaints were filed simultaneously, one against petitioner and one against his co-defendant, Jose Rodriguez; since the magistrate had both complaints before him at the same time, petitioner acknowledged that both should be considered in determining whether the requirements of Rule 5(a) were met (Pet. App. 5 n.2).

suppress the heroin on the ground that the complaints did not show probable cause for his arrest. He contended that the court was required to limit its consideration to the contents of the complaints filed after the arrest. Rejecting the contention that it was limited to considering the complaints, the district court conducted an evidentiary hearing and found (Pet. App. 1-3) that the arrest and the seizure of the heroin were supported by probable cause. The court of appeals affirmed (Pet. Apps. B and C).

ARGUMENT

1. Petitioner contends (Pet. 12-23) that in determining whether there was probable cause for his arrest the district court could not consider evidence that was not recited in the complaint filed after his arrest pursuant to Fed. R. Crim. P. 5(a). Rule 5(a) requires that a person arrested without a warrant be brought, without unnecessary delay, before the nearest federal magistrate, and that a complaint be filed forthwith that complies "with the requirements of [Fed. R. Crim. P.] 4(a) with respect to the showing of probable cause."[2]

This contention is wholly without merit. Whether a warrantless felony arrest in a public place is consistent with the Fourth Amendment turns upon the presence or absence of probable cause at the time the arrest is made. *United States* v. *Santana*, 427 U.S. 38, 42 (1976); *United States* v. *Watson*, 423 U.S. 411 (1976); *Whiteley* v.

[2]Rule 4(a) requires the complainant to demonstrate "probable cause to believe that an offense has been committed and that the defendant committed it."

Warden, 401 U.S. 560 (1971).[3] It follows that the contents of the complaint later filed pursuant to Rule 5(a) are not determinative of the constitutional validity of the arrest. As the court of appeals correctly observed (Pet. App. 11; emphasis in original):

> For it remains [true] that if there was in fact probable cause *at the time of the arrest*, the arrest was constitutional when made and cannot retroactively be made unconstitutional by a subsequent event, such as failure to comply with Rule 5(a).

Contrary to petitioner's contention (Pet. 14-15, 18), the court of appeals' decision allows the government no greater latitude under Rule 5 when it does not secure a warrant than when it follows the "preferred procedure" and obtains an arrest warrant pursuant to Rule 4. When a suspect is arrested, in a public place on a felony charge pursuant to a warrant, and the facts alleged in the affidavit filed in support of the warrant pursuant to Rule 4(a) are insufficient to show probable cause, or the affidavit is otherwise defective, the government may nevertheless demonstrate that the arrest was valid by

[3]Although petitioner states (Pet. 21) that he has "no disagreement with the Court of Appeals on the basic proposition that an arrest warrant is not constitutionally mandated," he nevertheless urges that the court of appeals' decision is in conflict with *Watson* (Pet. 22):

> Conceding the availability of warrantless arrests, and now [the] presence of the amended Rule 5(a), that Rule having been enacted to preserve the integrity of the Fourth Amendment, it cannot be said, as the decisions here do, that the Fourth Amendment didn't need it. There is a basic constitutionality built into Rule 5(a), just as there is a basic presumption of constitutionality involved in the statutes involved in *Watson*.

This argument is without merit. It does not follow from the fact that legislation is presumed to be consistent with the Constitution that compliance with statutory procedures is presumed also to be constitutionally required.

showing that the arresting officers in fact had probable cause. *E.g.*, *United States* v. *Rose*, 541 F. 2d 750, 756 (8th Cir. 1976), cert. denied, 430 U.S. 908 (1977); *United States ex rel. LaBelle* v. *LaVallee*, 517 F. 2d 750, 753 (2d Cir. 1975), cert. denied, 423 U.S. 1062 (1976); *Mayer* v. *Moeykens*, 494 F. 2d 855, 858 (2d Cir.), cert. denied, 417 U.S. 926 (1974); *Chrisman* v. *Field*, 448 F. 2d 175, 176 (9th Cir. 1971), cert. denied, 409 U.S. 855 (1972); *Ray* v. *United States*, 412 F. 2d 1052, 1053 (9th Cir. 1969); *United States* v. *Hall*, 348 F. 2d 837, 841-842 (2d Cir.), cert. denied, 382 U.S. 910 (1965); see *Coolidge* v. *New Hampshire*, 403 U.S. 443, 453 (1971); *Giordenello* v. *United States*, 357 U.S. 480, 488 (1958);[4] *United States* v. *Rabinowitz*, 339 U.S. 56, 60 (1950).[5]

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[4]Contrary to petitioner's arguments (Pet. 15-16), *Giordenello* v. *United States*, *supra*, is consistent with and indeed provides support for the court of appeals' decision. The question in *Giordenello* was whether the affidavit for an arrest was sufficient to support the magistrate's finding of probable cause. The Court concluded that the affidavit was inadequate because it was composed of only the complaining officer's conclusory hearsay statements and did not include the reasons for his belief or even a statement that he had spoken to the declarant. 357 U.S. at 486. The Court concluded that the government could not raise the argument that the arrest was valid despite the invalidity of the warrant for the first time in the Supreme Court, but it further observed that in the event of a retrial, the government could seek to justify petitioner's arrest without reference to the warrant. 357 U.S. at 487-488.

[5]Petitioner's allegation (Pet. 24-29) that the complaint contained criminally reckless misrepresentations was rejected by the court of appeals, which found (Pet. App. 19) no bad faith and, at most, "carelessness." In any event, for the reasons stated above, the contents of the complaint are irrelevant to the constitutional validity of petitioner's arrest. *Franks* v. *Delaware*, No. 77-5176 (June 26, 1978), which holds that the sufficiency of an affidavit in support of a search warrant should be judged without reference to false statements made knowingly or with reckless disregard of the truth, is simply inapposite. The validity of the seizure of the evidence in *Franks* depended upon the validity of the warrant, whereas the sufficiency or accuracy of the post-arrest complaint in the present case had no bearing on the lawfulness of petitioner's arrest or the seizure of evidence incident thereto.

3. Finally, petitioner contends (Pet. 29-31) that there was not probable cause for his arrest. After a careful review of the record, however, the court of appeals concluded that the district court had not erred in finding probable cause (Pet. 19-24). This determination involves only the application of settled principles of law to the specific facts of this case, and in light of the concurrent findings by both courts below, it presents no issue warranting review by this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1971); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

In any event, petitioner's claim is unfounded. Briefly, the evidence at the suppression hearing showed that on July 12, 1976, a DEA agent received information from an informant who had provided reliable information on at least 50 occasions that a large quantity of heroin had arrived in Chicago for Oscar Mancillas, and that Jose Rodriguez was to take an active part in its distribution (Tr. 20; Pet. App. 20-22).[6] The informant had previously advised that petitioner distributed narcotics for Mancillas (Tr. 7-8, 21-22). At about 9:00 p.m. on July 12, DEA agents observed petitioner emerge from Rodriguez' residence, look up and down the street, and then drive away in a black Cadillac (Pet. App. 22). After circling the block a few times, petitioner drove to the alley at the rear of the house he had just left. Rodriguez, who was carrying

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[6]"Tr." refers to the transcript of the suppression hearing.

a grocery-type brown paper bag with red writing on it, then came out of a rear exit; after looking furtively up and down the alley, he joined petitioner in the automobile (*id.* at 23). The two men proceeded to an apartment on West Pierce, where they left the brown bag after a brief stay. Around 11:30 that evening both men again left Rodriguez' residence and drove in separate cars to the West Pierce apartment. About midnight, petitioner emerged from the apartment carrying a brown bag which appeared to be the one Rodriguez had left there earlier. Rodriguez appeared immediately thereafter carrying a scale box of a type used in the weighing of narcotics. After looking about them, the two men drove away in different directions. They were stopped and arrested shortly thereafter, and the bag was found to contain two kilograms of heroin.

Given the totality of the evidence known to the arresting officers—including the reliable informant's tip about the drug distribution to take place on July 12 and the suspicious late-night activities of petitioner and Rodriguez, who was observed carrying narcotics paraphernalia—the courts below properly concluded that there was probable cause for petitioner's arrest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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